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IN THE

Supreme Court of the United States

Number 689

October Term, 1958

HUBERT R. GROGAN,

Petitioner in Certiorari

vs.

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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WESLEY R. ASINOF,
Attorney for Petitioner
419 Atlanta National Bldg.
Atlanta, Georgia

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Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

Now comes HUBERT R. GROGAN, petitioner in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

On May 7, 1957, in Gainesville, Georgia, a number of federal officers saw petitioner driving a 1954 Ford 1½ ton Van Truck on East Washington Street, one of the

main streets of the city, and at about 6:50 P.M. during the daylight hours. Petitioner drove the truck past the federal building, at which time petitioner threw up one of his hands and turned his face away from the direction of the officers. Some of the federal agents had previously thereto, (about a week to ten days) received reports of sales of sugar and other commodities to petitioner by dealers on other dates. The truck was closed, and the federal officers were not able to ascertain by the use of their senses the contents of the truck. The officers knew at that time that petitioner had been placed on probation previously thereto for violating the liquor laws. The truck appeared to the officers to be loaded when it drove past their sight.

The officers had no knowledge or information of what was on the truck nor did they have any report about that particular trip of the vehicle or that particular load." (Rec. 56.) The trial judge found as a fact that after the reports had been received by the officers, they "had ample time in which to obtain a search warrant but the reason they did not obtain a search warrant was because the vehicle was in constant transit and they had no knowledge of where the materials would be loaded upon or removed from the vehicle." (Rec. 56, Findings of Fact.)

After the officers stopped the vehicle, one of them asked petitioner for his driver's license and asked him what he had on the truck, whereupon he replied that he had sugar and malt. The officers then opened the doors of the panel truck and discovered the contents, 88 sacks of sugar, 8 sacks of malt sprouts, 150 cases of glass jars and 50 pounds of dry yeast. The vehicle and con-

tents were then seized by the officers and the petitioner placed under arrest on federal charges.

The United States filed its libel of information against the vehicle and contents, and petitioner, as owner thereof, filed his claim, defending on the ground that the seizure was in pursuance of an illegal and unlawful search of the claimant; and without a proper or lawful warrant either of arrest or to search, and said search and seizure were without probable or reasonable cause; and asked that the vehicle and contents be ordered suppressed as evidence and returned to the petitioner.

The trial judge overruled the motion to suppress and decreed the vehicle and contents forfeited. Based upon this same violation the trial judge also revoked petitioner's probation. Separate appeals were made by petitioner to the United States Court of Appeals for the Fifth Circuit, where it was stipulated that the evidence in the civil action would be considered in determining the probation revocation.

JURISDICTION

(a) The judgment of the Court of Appeals was entered on November 19, 1958, in Number 17487, involving the forfeiture proceeding, and on December 9, 1958, in Number 17269, involving the revocation of probation. Petitions for rehearing were denied in both cases on January 12, 1959. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S.Ct. XXXIX).

(b) The constitutional provision of the Constitution of the United States, the construction of which is involved in this application for certiorari, is as follows:

Amendment Four, United States Constitution.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(c) This petition for certiorari is being filed in this Court within 30 days from the date of the judgments denying the petitions for rehearing.

(d) The nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

1. The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

2. The United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

3. The United States Court of Appeals for the Fifth Circuit in this case has rendered a decision in conflict with the decision of the United States Court of Appeals for the District of Columbia on the same matter.

4. The United States Court of Appeals for the Fifth Circuit has decided a question of gravity and importance involving federal criminal procedure as it relates to searches and seizures of moving vehicles without warrant.

THE QUESTIONS PRESENTED

1. Whether a motion to suppress evidence is an available defense to a claimant in a civil proceeding to forfeit a vehicle and its contents alleged to have been used in violation of the Internal Revenue laws.

2. Whether the act of federal officers in stopping a person on a public highway was an arrest within the meaning of the law, where no misdemeanor had been committed in their presence prior thereto and no reasonable cause existed to suspect or believe that a felony had been or was being committed.

3. Whether the circumstances within the knowledge of the officers were sufficient to authorize them to stop the petitioner on a public highway and search his vehicle without a warrant.

4. Whether information imparted to federal officers more than a week in advance is sufficient to authorize them to search a vehicle without a warrant, when that information related to other transactions not related to the specific incident upon which the search was based.

5. Whether federal officers having no knowledge of where materials would be loaded upon or removed from a vehicle, but having information as to past purchases of raw materials, are excused from the necessity of obtaining a search warrant because of that fact alone.

6. Whether information of purchases more than a

week old of raw materials amounts to probable cause authorizing a search of a vehicle without a warrant, where no crime is being committed in the presence of the federal officers.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The decision of the United States Court of Appeals for the Fifth Circuit in these cases, holding in effect that mere probable cause to believe that a misdemeanor has been or is being committed would be sufficient to authorize the search of a vehicle without a warrant is in conflict with the holding of the United States Court of Appeals for the District of Columbia in the case of Hanna v. United States, 260 Fed. 2nd, 723, decided Oct. 2, 1958, advance sheet of January 12, 1959.

2. The United States Court of Appeals ignored the fact that the search of the vehicle commenced as soon as the federal agents stopped it, and that the stopping of the vehicle on the public highway amounted to an arrest within the meaning of the law, rendering the further statement by the petitioner incidental to such arrest.

3. The United States Court of Appeals for the Fifth Circuit erred in deciding that "The seizure of property, the title to which has been forfeited to the United States, is to be distinguished from the exclusion of evidence secured through an unlawful search and seizure." The Court of Appeals, in so holding, has overlooked and ignored the basic principal of the exclusionary rule that the government may not offer proof of such fact in a federal court, and that the lawful proof of the violation

is just as essential in a forfeiture proceeding as in any other.

APPENDIX

Petitioner herein appends to this petition a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in cases numbered 17187 and 17269.

Respectfully submitted.

WESLEY R. ASINOF,
Attorney for Petitioner
419 Atlanta National Bldg.
Atlanta, Georgia

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17269

HUBERT ROYCE GROGAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(December 9, 1958.)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

PER CURIAM: This appeal from a revocation of a suspended sentence for violation of probation is related to, and here largely controlled by, *Grogan, Claimant v. United States* (No. 17187), 5 Cir., 1958, ... F. 2d ... It was that episode of May 7, 1957, when he was arrested while driving a truck loaded with a large quantity of sugar, malt, yeast, and one-half-gallon fruit jars which

precipitated the legal actions which now beset Grogan.[1] The Court revoked the probation and imposed a sentence of eighteen months.

Grogan assigns but three errors.[2] The first two are patently unfounded. By stipulation the Court was to, and did, consider all of the evidence, subject only to the motion to suppress for unlawful search and seizure, heard earlier in the forfeiture case (No. 17187). The third, while certainly arguable with propriety at the time it was made, has now been foreclosed by our decision in No. 17187. At the same time it eliminated any question for our decision whether, as the District Court stated as an alternative ground, he could nevertheless take into account, in determining general compliance with the terms of probation, some of the events of May 7 even though the search and seizure were ultimately held illegal. Certainly there is no showing generally that the Court failed to follow the proper principles covering the revocation of probation. *Manning v. United States*, 5 Cir., 1947, 161 F. 2d 827, cert. denied, 332 U.S.

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1. There were proceedings on three fronts.

First, No. 17187, . . . F. 2d . . ., was a libel under 26 USCA §§7301, 7302, for forfeiture of the 1954 model Ford truck together with its cargo of moonshine contraband. Forfeiture was affirmed November 19, 1958, by our decision, . . . F. 2d . . .

Second, Grogan was indicted for the incident of May 7, 1957. On a jury trial Grogan was convicted but imposition of sentence has been withheld pending determination of No. 17187 and this case.

Third, the United States Probation Officer filed the motion of June 24, 1957 to revoke Grogan's probation because of the incident of May 7. That is the subject of this case, No. 17269.

2. "1. The Court erred in granting the motion to revoke the probation without evidence to support the allegations of fact.

"2. The Court erred in revoking the probation in that there was no evidence to sustain the allegations of fact, and in deciding the issue on matters within the pesonal knowledge of the trial judge and not offered in the record of the trial of this case.

"3. The Court erred in not giving consideration to the motion to suppress as having been previously urged in Case No. 4952 United States District Court for the Northern District of Georgia, same being a civil action for the forfeiture of a vehicle and raw materials."

792, 92 L. Ed. 374; *Dillingham v. United States*, 5 Cir., 1935, 76 F. 2d 35; *Kaplan v. United States*, 8 Cir., 1956, 234 F. 2d 345; *Nelson v. United States*, 10 Cir., 1955, 225 F. 2d 902; *Hensley v. United States*, 5 Cir., 1958, 257 F. 2d 681.

AFFIRMED.

A true copy
Test:

/s/ EDWARD W. WADSWORTH

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

JUDGMENT

Extract from the Minutes of December 9, 1958.

No. 17269

HUBERT ROYCE GROGAN,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17187

HUBERT R. GROGAN, Claimant, and
RUBY ALENE ANDERSON, Surety,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(November 19, 1958.)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

JONES, Circuit Judge: The appellant, Hubert R. Grogan, was on probation from a liquor law violation. Our references to the appellant apply to Grogan. His co-appellant is before us because of her liability as surety. Treasury Agents had information that appellant had made several purchases of large quantities of sugar and malt in the proportions usually used for making moonshine whiskey. The Treasury Agents observed him driv-

ing a truck, apparently heavily loaded, on the streets of Gainesville, Georgia. As the appellant drove by he attempted to shield his face from view with his hand and arm. The officers followed the appellant and stopped him. In response to a question as to "what he had on" the appellant answered "eighty-eight bags." He was asked where he was taking it and he said "Dawsonville," but he was headed away from rather than in the direction of that place. He said he was going to sell the sugar but didn't know who would purchase it. He admitted that he had no business license and no place of business. The officers opened the truck and found 88 hundred-pound bags of sugar, along with rye meal, malt, yeast and 130 cases of half-gallon glass jars. The United States, under the authority of 26 U.S.C.A. §§ 7301, 7302, filed its libel of information seeking the forfeiture of the truck and its contents. The appellant moved to suppress the vehicle and its contents alleging that the search and seizure were made without a warrant and without probable or reasonable cause. The motion to suppress was overruled and denied, and a judgment of forfeiture was entered. From the judgment an appeal has been taken. The asserted error, as stated by the appellant, is:

> "* * * in overruling the motion to suppress, in that the agents had no probable cause to believe that a felony had been or was being committed by appellant, no misdemeanor was being then committed in their presence that could be ascertained by the use of their senses, and they had sufficient time to procure a search warrant before making the search."

Primary reliance is placed by the appellant upon the opinion of this Court in *Clay v. United States*, 5th Cir. 1956, 239 F. 2d 196. This opinion illustrates and applies

the doctrine that a lawful arrest without a warrant, and a lawful search incident to such arrest, can be made only if a misdemeanor has been committed in the presence of the officer, or if the officer believes, upon reasonable and probable cause, that a felony has been committed. This doctrine was applied in the Clay case to the arrest of a person and the fact that he was in an automobile was, in the language of the Court, "purely incidental."

The officers who seized the truck here involved and its contents had information that the appellant had been purchasing raw materials for the moonshine industry and hauling them in the truck which was seized. The appellant's prior activity in illegal liquor dealings was known to the officers. His effort to conceal his identity as he drove by was a suspicious circumstance. The officers were justified in stopping and searching the truck upon a public thoroughfare without a warrant. *Carroll v. United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543; *Husty v. United States*, 282 U. S. 694, 51 S. Ct. 240, 75 L. Ed. 629, 74 A.L.R. 1407; *Brinegar v. United States*, 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879, reh. den. 338 U. S. 839, 70 S. Ct. 31, 94 L. Ed. 513; *Cannon v. United States*, 5th Cir. 1946, 158 F. 2d 952, cert. den. 330 U. S. 839, 67 S. Ct. 980, 91 L. Ed. 1286; 4 Wharton's Criminal Law 110 et seq. § 1537.

The seizure of property, the title to which has been forfeited to the United States is to be distinguished from the exclusion of evidence secured through an unlawful search and seizure. In the one case the Government is entitled to the possession of the property, in the other it is not. *Sanders v. United States*, 5th Cir. 1953, 201 F. 2d 158; *United States v. One 1956 Ford Tudor*

Sedan, 4th Cir. 1958, 253 F. 2d 725. And see *Turner v. Camp*, 5th Cir. 1941, 123 F. 2d 840. The search and seizure were based on probable cause and were proper. But were it otherwise the claimant would have no right to repossess the property forfeited to the United States.

The judgment of forfeiture is

AFFIRMED.

A true copy
Test:
/s/ EDWARD W. WADSWORTH

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

JUDGMENT

Extract from the Minutes of November 19, 1958.

No. 17187

HUBERT R. GROGAN, Claimant, and
RUBY ALENE ANDERSON, Surety,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is here ordered and adjudged by this Court that the judgment of forfeiture in this cause be, and the same is hereby, affirmed.